Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 78-1521.

ALAN B. EPSTEIN, SANFORD I. JABLON,
RICHARD A. WEISBORD, and ARNOLD J. WOLF,
Appellants,

v.

ADLER, BARISH, DANIELS, LEVIN & CRESKOFF,
a Partnership,
Appellee.

On Appeal From the Supreme Court of Pennsylvania.

MOTION OF APPELLEE TO DISMISS OR AFFIRM.

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MOTION OF APPELLEE ADLER BARISH DANIELS LEVIN & CRESKOFF TO DISMISS OR AFFIRM.

Appellee Adler Barish Daniels Levin and Creskoff ("Adler Barish") respectfully moves this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania, on the ground that the judgment is not one from which a right of review by appeal lies, and that in any event the questions raised by appellants are so insubstantial that they do not support jurisdiction on appeal or warrant further consideration by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Title 28, United States Code, Sections 1257(2) & (3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. . . .

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech. . . .

QUESTIONS PRESENTED.

1. Whether this appeal must be dismissed because appellants did not draw into question the validity of the Disciplinary Rules of the Pennsylvania Code of Professional Responsibility and because the Pennsylvania Supreme Court did not render a decision in favor of those Rules.

2. Whether the questions set forth in the Jurisdictional Statement are genuinely raised on the record in this case.

3. Whether the constitutional issues actually raised by the record are so insubstantial as not to merit further consideration by this Court.

ARGUMENT.

I. The Proceedings Below.

This case was brought by the appellee law firm Adler Barish against four recently terminated associates, after the firm discovered that they had commenced a large scale campaign to induce existing clients of the firm to terminate Adler Barish and to hire them instead. The firm claimed that this conduct constituted tortious interference with business relations and an abuse of confidential employment positions forbidden by the common law of Pennsylvania. The defendants argued that Pennsylvania law did not forbid their conduct, and that in any event the First Amendment protected it. Adler Barish sought and obtained preliminary and final injunctive relief. At the conclusion of the evidentiary hearing, the trial judge entered an order enjoining the defendants from contacting the firm's clients, but permitting them to send announcements of their new practice to all those clients, and permitting them to represent any of the firm's clients who chose to discharge the firm and hire the defendants instead.

The Superior Court reversed the trial court by a 4-3 vote, but the Supreme Court of Pennsylvania reversed the Superior Court by a vote of 6 to 1 and ordered the decree of the trial court reinstated. In an opinion by Mr. Justice Roberts, the Pennsylvania Supreme Court held that appellees had acted in violation of Pennsylvania tort law and that the constitution did not confer on appellants any privilege to act as they did. Appellants filed a notice of appeal to this Court.

II. The Appeal Must Be Dismissed Because Appellants Did Not "Draw Into Question the Validity of a [State] Statute," and Because There Was No "Decision in Favor of Its Validity" Within the Meaning of 28 U. S. C. § 1257(2).

Appellants purport to bring this appeal pursuant to 28 U. S. C. § 1257(2), which provides for review in this Court by appeal, "where is drawn into question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." Appellants' Jurisdictional Statement asserts that this case questions the validity of Disciplinary Rules 2-103(A) and 2-104(A) of the Pennsylvania Code of Professional Responsibility. The record, however, shows that appellants did not directly "draw into question" the validity of these rules [1] below, and that the decision of the Supreme Court of Pennsylvania was not one "in favor of [their] validity." Instead, this is a case in which the Pennsylvania Supreme Court construed the Pennsylvania common law of tortious interference with business relations, and decided against appellants' asserted constitutional privilege to engage in the conduct which that common law forbids. Accordingly, review may only be had, if at all, by writ of certiorari pursuant to 28 U. S. C. § 1257(3).[2]

1. We assume for purposes of this appeal that the Pennsylvania Supreme Court's Disciplinary Rules are a "statute" within the meaning of 28 U. S. C. § 1257(2). *Lathrop v. Donohue*, 367 U. S. 820 (1961); *Cf. Ohralik v. Ohio State Bar Association*, 436 U. S. 447 (1978). If, however, this case were not so clearly outside § 1257 (2) for the reasons detailed above, we would urge reconsideration of this construction of the statute.

2. That section provides for review by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States. . . ." 28 U. S. C. § 1257(3).

This was not a proceeding under the Pennsylvania Code of Professional Responsibility, and neither party treated it as such below. In fact, counsel for appellants argued in the Superior Court of Pennsylvania that exclusive jurisdiction to enforce these rules lies in the Disciplinary Board of the Supreme Court of Pennsylvania. Rule 17-1, Pennsylvania Rules of Disciplinary Enforcement; Brief for Appellant in the Superior Court, p. 18. The Superior Court found it unnecessary to reach that question, considering the case one to be decided under Pennsylvania's common law of tortious interference. *See* Opinion of the Superior Court, p. A-23,[3] n. 9 and accompanying text. Moreover, appellants were not and could not have been disciplined in or based on these proceedings.

Appellants did not assert the invalidity of these rules below; rather they argued that their conduct could not constitutionally be regulated under Pennsylvania's tort law. Therefore, appellants' claim here is like that discussed in *Mergenthaler Linotype Company v. Davis*, 251 U. S. 256 (1920). In that case it was asserted that the contract at issue was made in interstate commerce and therefore not constitutionally subject to state statutes. The Court held this claim "insufficient to challenge the validity of the [state statute]; at most it asserted a 'title, right, privilege or immunity' under the Federal Constitution which might afford basis for certiorari but constitutes no ground for writ of error[4] from this court." 251 U. S. at 259. This case is the same. As this Court more recently pointed out: "It is essential to our jurisdiction on appeal . . . that there be an *explicit* and timely insistence in the state courts that a state statute, as applied, is repugnant to

3. Page references such as this are to the Appendix to appellants' Jurisdictional Statement.

4. The review as of right applicable at the time that case was decided; its successor is the current appeal under 28 U. S. C. § 1257 (2). *See* Act of September 6, 1916, c. 448, 39 Stat. 726.

the federal Constitution, treaties or laws." *Charleston Federal Savings and Loan Association v. Alderson*, 324 U. S. 182, 185 (1945) (emphasis added). *Accord, Ungar v. Sarafite*, 376 U. S. 575, 582-3 (1964).

Equally important, the Pennsylvania Supreme Court did not make a decision "in favor of [the] validity" of the Disciplinary Rules in this case. One need only read the Court's opinion:

> Adler Barish argues that appellees' [appellants in this Court] conduct constitutes an intentional interference with existing contractual relationships between Adler Barish and its clients. . . . Appellees, on the other hand, contend that their conduct was "privileged" and that therefore no right of action for intentional interference lies. Moreover, they argue that their conduct is protected under the first and fourteenth amendments to the Constitution of the United States.
>
> P. A-42.

Writing for the court, Mr. Justice Roberts rejected appellants' constitutional claim. It is true that in doing so he discussed the fact that appellants' conduct clearly violated the Pennsylvania Code of Professional Responsibility and that this Court in *Ohralik v. Ohio State Bar Association*, 436 U. S. 447 (1978), had sustained the validity of an identical rule against a constitutional challenge. But the Pennsylvania Court was not sustaining the Disciplinary Rules against an assault on their validity; it was merely reasoning by analogy from this Court's most recent decision on the subject—a decision it found persuasive and controlling.[5]

5. Similarly, the apparent violation of the Disciplinary Rules was among the factors considered in deciding whether there should be a privilege as a matter of Pennsylvania common law: "We find such a departure from '[r]ecognized ethical codes' 'significant in evaluating the nature of [appellants'] conduct.'" P. A-46. But that decision of state tort law is of course not properly reviewed in this court.

The federal question considered was whether Pennsylvania may constitutionally forbid appellants' conduct as tortious interference. While the Pennsylvania court's decision in this case could have an impact, by force of logic or *stare decisis*, on some later case in which the validity of the Disciplinary Rules is challenged, those rules were not challenged here and their validity was not upheld. Thus these rules are even more "tangentially involved" than the statute found not "drawn into question" in *Garrity v. New Jersey*, 385 U. S. 493, 495-6 (1967). Accordingly, review is available in this Court, if at all, only by its discretionary certiorari jurisdiction and the appeal must be dismissed.

III. The Issues Set Forth in the Jurisdictional Statement Are Not Genuinely Presented by the Record Before This Court.

Appellants include in their Statement of Questions Presented and in their Statement of the Case assumptions and assertions which are simply not supported by the record before this Court; in fact, they often represent factual positions contended for by appellants, but resolved against them by the courts below. For example, appellants repeatedly suggest that they merely informed clients in a straightforward, neutral fashion of their impending departure from Adler Barish. They give the impression that only upon further inquiry by clients did they advise clients on their options regarding representation. P. 6. Finally, they suggest that the "discharge package"[6] they mailed to the clients was only sent to those clients who asked for help in effectuating a discharge. P. 7. But the

6. Following their in-person solicitation of individual clients, appellants mailed them a package including a form letter discharging Adler Barish, a completed contingent fee contract naming an appellant as attorney, and a stamped, addressed return envelope. *See* pp. A-59-A-61.

findings of the courts below are plainly to the contrary. Those findings illustrate an organized campaign to contact the firm's clients in person and to persuade them to become appellants' own.

The courts below found as a fact that defendant Epstein initiated contacts with clients of the firm "attempting to secure them and their open cases for himself and his new firm." Finding 19, p. A-16. The courts found as a fact that he engaged in solicitation in these contacts. *Id.* They further found that defendant Wolf, in the presence of two other defendants, stated his intention to contact Adler Barish clients "to attempt to secure them as his own clients." Finding 24, p. A-7. Finally, it was found as a fact that the defendants all asserted the intent, unless enjoined, to continue to contact clients of Adler Barish "in order to attempt to secure them as their (defendants') clients." Finding 26, p. A-8.

Nor did appellants in every case send their "discharge package" only in response to a client's request. The court found that at least one client (whose case had already been settled at the time, although distribution of the settlement had not yet been made) was mailed this package even though he never requested anything of the sort. Finding 22, p. A-7. The package sent him was nonetheless like the others, purporting to act on that client's instructions. *See* p. A-59. In both their in-person contacts with clients and in their mailings, appellants did not merely inform clients about their options, but rather suggested the course those clients should follow.

Appellants' statement of facts also ignores other aspects of their course of conduct found by the courts below, including the fact that they were found to have taken advantage of confidential information learned in the course of their employment. *See* p. A-56. The courts also found that defendant Epstein received certain fees and

kept them for himself, contrary to firm policy, and that shortly before he left, he began maintaining files for some cases without informing the firm (also contrary to firm policy). *See* p. A-39, n. 5.

Appellants, *who did not challenge these findings of fact in the Pennsylvania Supreme Court,*[7] cannot now ignore them or invent others simply to suit their convenience.[8] The record in this case simply does not support the scenario appellants conjure in their Jurisdictional Statement.

IV. The Constitutional Issues Presented on the Record in This Case Are So Insubstantial as Not to Merit Plenary Consideration by This Court.

Whether one treats appellants' Jurisdictional Statement as a petition for certiorari or considers this matter as properly before this Court on appeal, it is plain that the federal questions brought before the Court are neither novel, important, nor substantial. The following sections deal seriatim with the questions appellants present.

A. This Court's Decision in the *Ohralik* Case Justifies Pennsylvania's Regulation of Appellant's Conduct—Direct, In-Person Solicitation of Clients by Attorneys.

This appeal should be dismissed or the Pennsylvania Supreme Court affirmed because this Court's recent decision in *Ohralik v. Ohio State Bar Association, supra,* squarely controls the issues presented here. Like *Ohralik,* this case deals with the direct, in-person solicitation of clients by attorneys, with the same dangers (and proven instances) of overreaching and misrepresentation. And as in *Ohralik,* appellants here contend that their solicitation cannot be proscribed consistent with the First Amendment.

It should be noted at the outset that the speech implicated here is purely "commercial speech", in no sense like that dealt with in *In re Primus,* 436 U. S. 412 (1978), or *NAACP v. Button,* 371 U. S. 415 (1963). As this Court pointed out in *Ohralik, supra*:

> A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. [citation omitted]. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests. 436 U. S. at 459.

The Court in *Ohralik* then weighed the very substantial state interests in regulating attorney conduct against the First Amendment, and determined that the state could constitutionally proscribe solicitation by attorneys.

This case is the same, except that here the attorney's conduct was forbidden in the context of the state's common law prohibition against tortious interference with contract. This is no reason to change the constitutional analysis. Nor did the Court in *Ohralik* limit its holdings to approval of the state's regulation of the specific conduct of that litigant:

> [A]ppellant errs in assuming that the constitutional validity of the judgment below depends on proof

7. Indeed, they stated at page 12 of their brief in that court that "[Adler Barish] has argued that such findings should not be disturbed, a position with which we vociferously agree."

8. The statement of the case also contains lengthy recitations of irrelevant matter. It includes the text of the preliminary injunction in this case, which is plainly no longer the source of any live controversy and not challenged in this appeal. It also suggests that under Pennsylvania procedure, appellants should have been permitted to file preliminary objections to the complaint. This, of course, is a wholly non-federal issue. Such allegations are not dealt with further in the jurisdictional statement, and will not be commented on further here.

that his conduct constituted actual overreaching or inflicted some specific injury on [the prospective client]. . . .

Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the States seeks to avert. *In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.*

. . .

Under such circumstances, it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.

436 U. S. at 464, 466. (emphasis added).

See also, Friedman v. Rogers, — U. S. —, 47 U. S. L. W. 4151, 4154 (1979) (a form of commercial speech could be forbidden where there was a "significant possibility" that it would be used to mislead the public).

Even if the *Ohralik* holding required that in every case there be circumstances likely to result in misrepresentation and overreaching, such circumstances were certainly present here. Appellants make much of the fact that they had worked as employees of the firm on the cases of the clients they solicited. But this *increases* rather than decreases the dangers of overreaching in their

solicitation of these people as clients. And Epstein's mailing of the "discharge package" to Mr. Perkins after discussing the settlement of his case with him is a textbook example of overreaching and misrepresentation by an attorney. As Mr. Justice Roberts wrote for the Supreme Court of Pennsylvania: "Just as in *Ohralik*, appellees' conduct frustrates, rather than advances, Adler Barish clients' 'informed and reliable decision making.'" P. A-46. Because the facts of this case are so clearly controlled by this Court's teachings in *Ohralik*, the question raised by appellants is insubstantial, and the judgment of the Supreme Court of Pennsylvania should be summarily affirmed.

B. The Injunction in This Case Is Neither Unconstitutionally Overbroad Nor an Impermissible Prior Restraint on Speech.

Appellants also seek to take advantage of the traditional First Amendment doctrines regarding overbreadth and prior restraint. This argument is easily dealt with, since this Court has held that these doctrines do not apply in this context. In *Bates v. State Bar of Arizona,* 433 U. S. 356 (1977), this Court specifically held the doctrine inapplicable to attorney advertising:

> [T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. . . . Since overbreadth has been described by this Court as "strong medicine," which "has been employed . . . sparingly and only as a last resort," *Broderick v. Oklahoma,* 413 U. S. at 613, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective.
>
> 97 S. Ct., at 2707-8.

Similarly, this and other courts have refused to apply to commercial speech the traditional prohibition against prior restraints. *Virginia Pharmacy Board v. Virginia Consumer Council* 424 U. S. 748, 772 n. 24 (1976); *Friedman v. Rogers, supra,* 47 U. S. L. W. at 4154; *Beneficial Corporation v. Federal Trade Commission,* 542 F. 2d 611, 619 (3d Cir. 1976).

In any event, the order in this case was a reasonably necessary means of accomplishing the state's remedial objective. The court here was dealing with particularly egregious conduct and with an openly avowed intent on the part of appellants to resume soliciting clients if not enjoined. Finding 26, p. A-8. Moreover, communication which did not pose dangers of misrepresentation and overreaching was permitted under the order. As the Supreme Court of Pennsylvania pointed out, nothing in the challenged decree prohibited appellants from engaging in truthful advertising protected under *Bates,* including advertising designed to inform Adler Barish clients of appellants' new firm and its availability to serve those clients. They were explicitly permitted to send (and did send) formal announcements regarding the formation of their firm to clients of Adler Barish. And they were explicitly left free to represent those clients who voluntarily chose to discharge Adler Barish and to hire them instead. Thus alternate channels to communicate the new practice remained available. Accordingly, the injunction was for the most part a regulation of the time, place, and manner of speech. Such regulation is permissible even for "ideological" speech. *Friedman v. Rogers, supra,* 47 U. S. L. W. at 4153; *Grayned v. City of Rockford,* 408 U. S. 104 (1972); *Virginia Pharmacy, supra,* 425 U. S. at 771.

C. This Case Presents No Problems of Vagueness.

Finally, appellants try to force another traditional First Amendment doctrine—vagueness—into this case. But the vagueness doctrine fits this situation no better than the others. As the Court pointed out only a few months ago, "Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area." *Friedman v. Rogers, supra,* 47 U. S. L. W. at 4154 n. 9. Even if the doctrine applied in the context of commercial speech, one would have to strain mightily to relate it to this case.

Appellants direct their vagueness challenge at Disciplinary Rule 2-103(A).[9] We note again that this rule was not enforced against appellants in this case; rather, the Pennsylvania common law of torts provided the basis for the injunction. Appellants have not been disciplined or otherwise suffered under the Rule. Perhaps more importantly, the Rule is obviously not vague; it is a clear and simple proscription against self-recommendation. Appellants' argument that it is vague as applied to their conduct assumes that they did not in fact engage in solicitation. Yet as is detailed above, p. 9, solicitation is precisely what the courts below found appellants to have done.

CONCLUSION.

This case is not properly reviewed in this Court by appeal because there was neither enforcement of nor a decision in favor of the state statute challenged by appellants. In any event the case is squarely controlled in every important respect by this Court's decision in *Ohralik v. Ohio State Bar Association.* Therefore no substantial or important federal question is presented. Accordingly, the appeal should be dismissed or the judgment of the

9. The same rule upheld in *Ohralik, supra.*

Supreme Court of Pennsylvania should be summarily affirmed.

Respectfully submitted,

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